UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1

1621 ROUTE 22 WEST OPERATING COMPANY, LLC D/B/A SOMERSET VALLEY REHABILITATION & NURSING CENTER **and** **SEIU 1199 UNITED HEALTHCARE WORKERS EAST, NEW JERSEY REGION**	**Cases 22-CA-069152** **22-CA-074665**

COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY TO RESPONDENT'S RESPONSE IN OPPOSITION TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S MOTION TO STRIKE AND FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Section 102.24(c) of the Board's Rules and Regulations, the undersigned Counsel for the Acting General Counsel (General Counsel) files this Reply to Respondent's Response in Opposition to Counsel for the Acting General Counsel's Motion to Strike and for Partial Summary Judgment filed on March 16, 2021 (Opposition).

I. INTRODUCTION

As argued herein, Respondent's Opposition does not support dismissal of the General Counsel's March 8, 2021 Motion to Strike and for Partial Summary Judgment (Motion). Respondent's arguments are unsupported by the facts or the law, and, therefore, the General Counsel's Motion should be sustained. Accordingly, the General Counsel respectfully requests that the Board strike and/or grant summary judgment with respect to paragraphs 1(a)-(h), 2(a)-(i), 3(a)-(f), 3(h)-(o), 4(a)-(i), and 5 of the Compliance Specification (Specification) and deem them admitted as true, without the taking of additional evidence, and that the Board grant the General Counsel's Motion and the relief sought therein.

II. BACKGROUND

On March 8, 2021, the General Counsel filed a Motion to Strike and For Partial Summary Judgment with respect to Respondent's Amended Answer (Answer) to the Specification issued on December 22, 2020.

On March 16, 2021, Respondent filed its Opposition.

III. ARGUMENT

As set forth in the General Counsel's Motion, Respondent's Separate Defenses 8-13 are contrary to Board law and should, therefore, be stricken both as separate defenses, and as defenses to any of the enumerated paragraphs of the Specification. Additionally, as set forth in General Counsel's Motion, the General Counsel moves to strike and seeks summary judgment with respect to paragraphs 1(a)-(h), 2(a)-(i), 3(a)-(f), 3(h)-(o), 4(a)-(i), and 5 of the Specification because Respondent's Answer does not satisfy the requirements of Section 102.56(b) of the Board's Rules and Regulations. Accordingly, the specified defenses and Respondent's answers to those allegations should be stricken and deemed to be admitted as true, without the taking of further supporting evidence.

General Counsel's Motion addresses most of the issues raised by Respondent in its Opposition. Accordingly, this brief is limited to aspects of Respondent's Opposition that particularly warrant a response.[1]

Defenses 8 and 9

Respondent's argument with respect to its Special Defenses 8 and 9 is without merit. Arguing that these defenses should not be stricken, Respondent cites *NLRB v. Community Health*

[1] To the extent that Respondent repeats the same argument multiple times in its Opposition, the General Counsel will only address it the first time it is raised, unless circumstances warrant addressing it again in the context of another paragraph of the Specification.

Services, 812 F.3d 768 768 (10th Cir. 2016) for the proposition that the Board is required to consider any unique circumstances that would make a remedy's application in a particular situation oppressive, and therefore not calculated to effectuate the policy of the Act. Respondent also cites a number of U.S. Circuit Court of Appeals cases in which, for reasons unique to the underlying facts of each of those cases, the Court declined to enforce a Board order. It is noteworthy that Respondent cited no Board decisions for this proposition. Nevertheless, the cases cited by Respondent are inapposite. In *TNS, Inc. v. NLRB*, 296 F.3d 384 (6th Cir. 2002), for example, the Court set aside a backpay award after concluding that reinstatement of the discriminatees was no longer realistic given changes in the respondent's structure and business. Respondent also cites *NLRB v. Mountain Country Food Stores*, 931 F.2d 21 (8th Cir. 1991), in which the Court declined to enforce a Board order due to significant changes in the facts and circumstances such that the Board order no longer addressed a meaningful controversy. In that case, by the time the Board heard the case on the remedy issue, the Union that had brought the underlying charge had been decertified, the store had relocated, and the identity and number of the respondent's employees had changed. Additionally, in *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181 (2nd Cir. 1991), the Board declined to enforce a Board order where the affected workers had already been made whole via a successor collective bargaining agreement. Although the Court in each of these cases articulates a unique set of circumstances supporting its decision not to enforce the Board's order, Respondent in the instant case has not demonstrated why it should not be held to account for its unfair labor practices and has not cited one case where the Board's delay in rendering a decision is grounds to reduce, toll, and/or deny backpay.

Defense 11

Respondent's arguments in support of its Separate Defense 11 are also without merit. Respondent contends that the Board's decision in *King Soopers,* 364 NLRB No. 93 (2016), which the Board applied retroactively to all pending cases, should not apply to the instant case because such application would be unjust. Respondent argues that D'Ovidio's interim expenses exceed her net backpay, which, it asserts, is inconsistent with the Act's remedial policy of making employees whole for actual losses incurred as a result of the unfair labor practices, and that an award of such expenses would give her an unwarranted windfall. Respondent's position was addressed directly, and was explicitly rejected, by the Board in *King Soopers, Inc.*, 364 NLRB No. 93 (2016):

> …[E]ven if the Board's revised remedial policy might result in a limited number of discriminatees with unusually high interim earnings receiving additional reimbursement, this fact would not cause us to reject it. In our view, such a circumstance would constitute "a permissible remedial outcome if it bears "an appropriate relation to the policies of the Act." In *NLRB v. Seven-Up Bottling Co.*, the Supreme Court found that "[i]t is the business of the Board to give coordinated effect to the policies of the Act[,]" and stated that "[w]e prefer to deal with these realities and to avoid entering into . . . debate about what is 'remedial' and what is 'punitive."' 344 U.S. at 348. Fully compensating discriminatees for search-for-work and interim employment expenses even when a discriminatee's interim earnings equal or exceed his or her lost earnings and expenses appropriately relates to the policies of the Act because this approach will deter unfair labor practices and encourage robust job search efforts.

Id. at 10.

First and foremost, Respondent's position should be rejected because it is contrary to Board law. As discussed by the Board in *King Soopers,* the remedial framework set forth in that case will not result in discriminatees receiving more than make-whole relief,

> because incurring search-for-work and interim employment expenses represent[s] a different injury than losing wages. Thus, reimbursement of these expenses compensates discriminatees for a separate injury than lost pay…. [T]he Board has recognized this distinction by awarding other expenses incurred by discriminatees

> regardless of interim earnings and separately from taxable net backpay, with interest.

Ibid. Moreover, if Respondent were to prevail on these grounds, such a decision would, as discussed by the Board in *King Soopers*, supra, disincentivize discriminatees from mitigating their losses while rewarding employers for their misconduct.[2] Under these circumstances, and for the reasons articulated in the General Counsel's Motion, Respondent's Separate Defense 11 should be stricken.

Defenses 12 and 13

Respondent's Defenses 12 and 13 are similarly without merit. First, the General Counsel withdraws her assertion that current Board law "…entitles d'Ovidio to be made whole for any lost 401(k) plan contributions without any such offset based on…similar contributions that may have been made on her behalf by an interim employer." As recognized by the General Counsel earlier in the same section of her Motion, "…equivalent retirement benefits earned from interim employment are appropriately offset against gross retirement benefits." Thus, to the extent that D'Ovidio earned equivalent retirement benefits from any interim employer, such earnings should be offset against any retirement benefits she earned from Respondent. With respect to its Defense 13, however, although Respondent argues that certain cash payments by interim employers relating to retirement contributions can be offset against net backpay, citing *United Enviro Systems, Inc.* 323 NLRB 83 (1997), it cites no facts that would warrant a departure from

[2] Additionally, awarding search-for-work and interim employment expenses separately from taxable net backpay, with interest, avoids potential tax complications caused by the Board's traditional approach. The Internal Revenue Service (IRS) and the Social Security Administration (SSA) consider backpay taxable wages in the year received. Thus, despite search-for-work and interim employment expenses being nonwage components of backpay, not subject to payroll or social security taxes (see CHM Sec. 10578.1), the Board's traditional approach has resulted in mixing these expenses with wages. The remedial changes urged by the General Counsel will avoid the potential complications engendered by this approach, resulting in a clearer accounting for the discriminatee, the IRS, and the SSA. *King Soopers, Inc. supra,* at 8.

the standard Board remedy in the instant case. Accordingly, for the reasons articulated in the General Counsel's Motion, Respondent's Separate Defense 13 should be stricken because it is counter to established Board law.

Respondent argues in its Answer to paragraph 1(a) of the Specification that it does not deny the applicability of the cases cited therein. Rather, it contends, it objects to the General Counsel's allegation that 'the backpay shall be calculated' in accordance with those cases, which, it contends, assumes that nothing else is to be considered in the calculation of backpay." Respondent's defense is disingenuous, and should be stricken, in view of the fact that the purpose of the Specification, taken altogether, is to lay out the multiplicity of other factors that the General Counsel has considered in arriving at its final backpay computation.[3] As argued in the General Counsel's Motion, to the extent that Respondent seeks to challenge the Board's determination in the underlying unfair labor practice case, its answer should be stricken.

Similarly, in its answer to paragraph 1(b) of the Specification, Respondent asserts that it is not seeking to relitigate Board law. Instead, it argues, its objection is to the amounts of interest in Exhibits A and B of the Specification. Notably, however, paragraph 1(b) of the Specification does not make any reference to either of the exhibits. For that reason and, to the extent that Respondent relies on its arguments in support of its Separate Defense 15, its answer remains deficient and should be stricken.[4]

[3] Indeed, the cases cited by Respondent in its Opposition to paragraph 1(a) relate to issues involving interim earnings and failure to mitigate, none of which is at issue in that paragraph.

[4] Throughout its Response, Respondent repeatedly insists that, in denying certain allegations, it is not seeking to challenge established Board law. To the extent that Respondent denies any allegation that constitutes a statement of what the current Board law is, for example, with respect to the start and end dates of a discriminatee's backpay period, and nothing more, Respondent's denial must be stricken for the reasons articulated in General Counsel's Motion.

Respondent rejects the General Counsel's rationale for its Motion with respect to paragraph 1(c). Respondent argues that the General Counsel "ignores" that the requirement under Section 102.56(b) only applies to matters within Respondent's knowledge, implying, but not stating directly, that it lacked knowledge sufficient to admit or deny the allegation on its own terms. Information concerning the amount that the discriminatees would have earned if they had been continually employed by Respondent during the backpay period is, in fact, uniquely within Respondent's knowledge. Therefore, the requirements of Section 102.56(b) apply and the Board should strike Respondent's answer to paragraph 1(c) and grant the General Counsel's Motion.

Moreover, Respondent characterizes the distinction that the General Counsel draws between allegations that relate to computation of gross backpay and the question of whether the discriminatees satisfied their obligation to mitigate as being "more semantic than substantive." Nothing could be farther from the truth. Paragraph 1(c) merely articulates what constitutes gross backpay under Board law. As explained in *Int'l Bhd. of Teamsters Loc. 25*, 366 NLRB No. 99 (2018), each party bears its own burdens with respect to computation of backpay, and the differences between these burdens are substantive:

> The General Counsel bears the burden of establishing the gross backpay due to a discriminatee. Once the General Counsel has met this burden, the Respondent may establish an affirmative defense that would reduce its liability, including, for example, willful loss of earnings….The Board may toll backpay during any portion of the backpay period in which a discriminatee failed to mitigate her losses.

Id. at 2 (citations omitted).[5] Since paragraph 1(c) relates to the General Counsel's burden of establishing the gross backpay due to the discriminatees, and not on Respondent's affirmative

[5] See also *G4S Secure Sols. (USA), Inc*., 368 NLRB No. 1 (2019) (Compliance proceedings restore the status quo ante existing before the unfair labor practice. An unfair labor practice finding is presumptive proof of backpay liability. The GC must first adduce the gross backpay amount due. Thereafter, the burden shifts to the respondent to reduce its liability. The GC need only show that his gross backpay amounts are reasonable and non-arbitrary.)

defenses which attempt to reduce its liability so as to cause the Board to toll backpay during any portion of the backpay period, the Board should, as previously requested by the General Counsel, strike Respondent's answer and grant summary judgment with respect to this paragraph.

Respondent's arguments with respect to paragraph 1(d) are similarly problematic. Although its arguments make clear that Respondent seeks to change the backpay period end date, it does not dispute the General Counsel's assertion that Respondent seeks to relitigate established Board law. Its Separate Defenses 6 and 7 do so explicitly, suggesting a backpay period end date for Mangal of "no later than March 2012," and for D'Ovidio of "no later than January 2012." The backpay period end date is not fungible, as Respondent suggests. While it is true, as discussed herein, that Respondent is entitled to try to reduce its liability by seeking to toll the backpay period, that is an entirely different concept than the concept set forth in *Welden International*, 340 NLRB 666, 676 (2003), cited in the General Counsel's Motion. Respondent's Separate Defenses 2-7 relate entirely to Respondent's affirmative defenses which seek to reduce its backpay liability by demonstrating the discriminatees' failure to mitigate and/or their unavailability to work, and have no bearing at all on when Board law provides that the backpay period ends. Respondent has cited no Board law that provides a different formula than the one articulated in paragraph 1(d) for calculating gross backpay, nor has it demonstrated that Board law privileges it to substitute its own backpay period end date for the one alleged by the Board. For all of these reasons, Respondent's answer to paragraph 1(d) should be stricken, and the General Counsel's Motion should be granted.

Finally, Respondent argues that it furnished alternate supporting figures not in response to paragraph 1(d), but rather in its answers to paragraphs 2(f) and 3(f) of its Answer. Even if Respondent had provided its alternative supporting figures in response to paragraph 1(d), its

answer would have fallen short of its obligations under Section 102.56(b), because it does not articulate a formula, based on current Board law, to replace the one alleged by the General Counsel. The purpose of the backpay specification is to make the discriminatees whole for the work they performed during the backpay period. Absent a valid formula for setting the parameters of their respective backpay periods, the General Counsel cannot compute a make-whole remedy for them. For all of these reasons, Respondent's answer to paragraph 1(d) should be stricken and the General Counsel's Motion should be granted.

Respondent's answers to paragraphs 1(e) and (f) of the Specification is deficient for all of the reasons articulated in the General Counsel's Motion. It raises no new arguments and continues to conflate the General Counsel's burden of establishing gross backpay with its own opportunity, once the General Counsel has done so, to try to reduce its backpay liability by demonstrating that either or both of the discriminatees failed to mitigate or was unavailable to work for part of the backpay period not already accounted for in the Specification, as set forth in its Separate Defenses 2-7. For all of these reasons, the Board should strike Respondent's answer to paragraphs 1(e) and (f) of the Specification and grant the General Counsel's Motion.

Respondent's answers to paragraphs 1(g) and 1(h) of the Specification are also deficient because the allegations merely constitute a statement of current Board law. Once again, Respondent does not dispute that it seeks to challenge established Board law. To the extent that it does, its answers should be stricken and the General Counsel's Motion should be granted with respect to these two paragraphs. Moreover, Respondent's argument that the General Counsel seeks to deny it the opportunity to refute the basis for its computation of D'Ovidio's interim earnings is patently false. Neither the allegations contained in either paragraph 1(g) or 1(h), nor the General Counsel's discussion of these paragraphs in its Motion refers to either discriminatee

by name. Allegations with respect to the computation of each of the discriminatees' interim earnings are contained in paragraphs 2(g) and 3(h) of the Specification. Contrary to Respondent's representation, the General Counsel does not seek summary judgment in its Motion with respect to paragraphs 2(g) and 3(h) to the extent that Respondent contests the amount of either discriminatee's interim earnings as set forth in exhibits to the Specification.[6] For all of these reasons, the Board should strike Respondent's answers to paragraphs 1(g) and 1(h) of the Specification and grant the General Counsel's Motion with respect to these two paragraphs.[7]

Respondent contends, with respect to paragraph 3(f) of the Specification, that its answer, which includes alternative figures for two (2) of the seven (7) years of the discriminatees' backpay periods, is sufficient because the alternative calculations it provides are limited to matters within the scope of its knowledge and are subject to further modification.[8] Respondent does not explain why it purports to have knowledge with respect to only two (2) of the seven (7) years. Nevertheless, the allegation in paragraph 3(f) is based on current Board law with respect to how gross backpay for D'Ovidio was computed, and Respondent's nonresponsive answer should be stricken because it fails to meet the requirements of Section 102.56(b). To the extent that Respondent only seeks to contest the computations set forth in Exhibit B, its Answer is sufficient.

[6] The General Counsel respectfully requests to substitute the following for the final sentence of her arguments with respect to paragraph 3(h) on page 16 of her Motion: "To the extent, however, that Respondent merely seeks to contest the amount of D'Ovidio's interim earnings, the General Counsel does not seek summary judgment with respect to paragraph 3(h)."

[7] In its Opposition, Respondent does not contest the General Counsel's arguments in her Motion with respect to paragraphs 2(i), 2(j), and 2(k).

[8] Given Respondent's repetition of many of the same arguments, rather than address its remaining answers individually, the General Counsel will focus on several of Respondent's arguments that warrant further discussion.

In addition to its other arguments, Respondent argues with respect to paragraphs 3(m), 3(n), and 3(o) of the Specification that the Board's Rules do not require it to furnish appropriate supporting figures because the allegation itself does not set forth any figures. While the allegations do not set forth any figures, Section 102.56(b) of the Board's Rules nevertheless requires Respondent, when it denies an allegation as to a matter within its knowledge, to "specifically state the basis for such disagreement, setting forth in detail [its] position…" Moreover, Respondent contends that these allegations are inconsistent with the NLRB's Casehandling Manual because they do not provide certain "highly individualized information such as D'Ovidio's investment preferences and investment selections." In fact, the NLRB's Compliance Casehandling Manual does not require that a Specification lay out in detail for the Respondent a discriminatee's investment preferences and/or selections. If any such information was a factor in the Regional Director's determination as to whether D'Ovidio is entitled to any investment earnings on her 401(k) earnings, it is reflected in Exhibit C to the Specification. To the extent that Respondent contests the amount of 401(k) contributions owed to D'Ovidio as set forth in Exhibit C, the General Counsel does not seek summary judgment with respect to paragraph 3(o).

In summary, except as argued herein, the Board should strike and grant summary judgment as to paragraphs 3(m), 3(n), and 3(o) of the Specification because Respondent failed to state with specificity the basis for its denial and has failed to demonstrate that the allegations themselves do not meet the requirements set forth in the NLRB Casehandling Manual.

IV. CONCLUSION

Respondent has failed to establish any basis for the Board to deny the General Counsel's Motion. Neither its Special Defenses nor its other arguments are supported by Board law. In

conclusion, Respondent's denials as to the disputed paragraphs of the Specification are insufficient under Section 102.56(b) of the Rules and, therefore, General Counsel's Motion should be granted. .

Boston, Massachusetts

Date: March 23, 2021

Respectfully submitted,

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AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY TO RESPONDENT'S RESPONSE IN OPPOSITION TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S MOTION TO STRIKE AND FOR PARTIAL SUMMARY JUDGMENT

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **March 23, 2021,** I served the above-entitled document(s) by **electronic mail** upon the following persons, addressed to them at the following addresses:

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